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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re D. B., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. R.H., et al., Defendants and Appellants.	D060599 (Super. Ct. No. NJ14066)

APPEAL from an order of the Superior Court of San Diego County, Blaine K. Bowman, Judge. Reversed and remanded with directions.

Mother R.H. and father Donald B. (together, the parents) appeal following an interim post-permanency planning review hearing (Welf. & Inst. Code, § 366.3; further statutory references are to this code unless otherwise specified) in the dependency case of

their son, D.B. The parents contend the juvenile court abused its discretion by restricting their visits to the grounds of D.B.'s group home, and the court violated their due process rights by imposing the visitation restriction without prior notice. We conclude the parents were denied their due process right to an evidentiary hearing on the proposed restriction. Accordingly, we reverse.

BACKGROUND

D.B. was the subject of numerous child welfare referrals from age one to age 11. The referrals included three separate reports of neglect and two of emotional abuse, all substantiated, and five separate reports of physical abuse, all deemed inconclusive ("determined . . . not to be unfounded, [with] insufficient evidence to determine whether child abuse . . . occurred." (Pen. Code, § 11165.12, subd. (c)). The parents had criminal histories; R.H. for fighting in public and Donald for vandalism and possessing a controlled substance. The parents admitted chaining D.B. to a wall in their home. D.B. said he had run away from home many times because his parents did not want him.

In October 2008 the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition for D.B., who was nearly 12 years old. The petition alleged he had an emotional disability or disorder, as evidenced by his behavior. D.B. had run away from home over 50 times, stolen the family car three times and stolen money from family members. He had hurt his younger siblings, put pillows on their heads and threatened to kill R.H. D.B. had associated with two competing gangs, and as a result he had been beaten up by gang members. The parents had been unable to provide

D.B. the mental health treatment he required, and were no longer willing to have him in their home.

D.B. was detained in a group home. At the October 2008 detention hearing, the court stated, "The parents . . . are to have unsupervised visits with [D.B.] primarily when he's on grounds at placement because it's the safest place right now." In December the court entered a true finding on the petition, ordered D.B. placed in a group home and ordered reunification services for the parents. The court ordered unsupervised visits, and gave the social worker discretion to allow overnight and weekend visits with notice to D.B.'s counsel and 60-day trial visits with the concurrence of D.B.'s counsel. The court did not restrict visits to D.B.'s placement.

Throughout this case the parents never visited D.B. The parents believed it was D.B.'s responsibility to change his behavior and did not recognize the need to change their own. R.H. continued to use methamphetamine.

D.B.'s conduct improved after he was detained, but by May 2009 it had begun to decline, especially when the parents did not respond to his telephone calls requesting visits. By November his behavior was considerably worse and he was detained in a different group home. The parents' choice to distance themselves from D.B. diminished his motivation to change and he became despondent.

On November 23, 2009, the court terminated reunification services and ordered a permanent plan of another planned permanent living arrangement. D.B.'s counsel requested that D.B.'s "passes" be extended from the current eight hours to weekends and

overnights so he could spend more time away from his group home and with his family. The court gave the Agency discretion to expand the passes to weekends and overnights.

The Agency's first section 366.3 post-permanency planning review report, filed in May 2010, stated the parents had contact with D.B. only when the paternal great-grandmother telephoned D.B. and during scheduled visits at her home, where the parents also lived. The Agency recommended monthly visits between D.B. and his parents.

The parents did not attend the first post-permanency planning review hearing in May 2010, although the court had ordered them to return and the Agency had given them notice. At the hearing, D.B.'s counsel stated "[t]here has been some talk about [the parents] separating and the possibility of [D.B.] living with [Donald]." At the request of D.B.'s and Donald's attorneys, the court confirmed the social worker's discretion to begin a 60-day trial visit between D.B. and Donald. The court confirmed a similar discretion regarding R.H.

In November 2010, the Agency reported that R.H. "never contacts" D.B. and Donald "rarely calls him." D.B. continued to experience grief as a result of his separation from his parents. D.B. had "unsupervised day passes" with several relatives, his court appointed special advocate (CASA) and his mentor. The Agency planned to assess visits to the parents' home for a possible "lack of supervision in the home." The CASA reported that D.B. "behaved exceptionally well" during their outings. The parents did not attend the second post-permanency planning review hearing on November 29, although they had been given notice.

In January 2011 D.B. was transferred to a high school off the grounds of his placement. While attending that school he brought drugs back to the group home and sold them, and used drugs himself. As a result, he was transferred to the group home school and began a drug treatment program. D.B.'s only interaction with his parents was when he called them, and when he saw them briefly when they dropped off his siblings at the grandparents' home. According to a report the Agency filed in May, D.B. had unsupervised day passes with relatives and his CASA, but visits with the parents were supervised. The CASA reported that D.B. missed his family "unbearably" and blamed himself for the estrangement. D.B.'s behavior during outings with the CASA "continued to be impeccable."

The parents attended the third post-permanency planning review hearing in June 2011. Donald's counsel told the court "the parents are working with the social worker to set up more visitation." R.H.'s counsel added "[t]hey are going to start out with four hours unsupervised and gradually go on from there." The court asked whether the parents had visited D.B. in the last reporting period. R.H. said, "We have seen him, but we haven't scheduled visits." The court asked, "What's the problem?" R.H. replied, "There's not a problem. We didn't understand the importance of making appointments ourselves." After D.B. said he wished to have visits with the parents, the court told the parents to "get over there and see your kid." R.H. responded, "We see him every couple of weeks." The court set an interim review hearing for August 1 for "an update on [the parents'] visitation . . . and how often they have been out to see [D.B.]," and to address D.B.'s wish to return to an off-site school. The court ordered the Agency to submit a

report addressing both issues and ordered the parents to return on August 1. The Agency filed a report on July 22, but it did not address visitation.

A short time after the June 2011 hearing, D.B. obtained marijuana during a visit at the parents' home. Then, on June 20, he ran away from his graduation ceremony at the drug treatment program. He stayed with members of his extended family until the early morning hours of June 22, when he called his group home and asked to be picked up. D.B. was restricted to the grounds of his placement for a month. On July 29, a pipe was found in a bathroom D.B. shared with other group home residents. D.B. was required to drug test and was not allowed to leave this placement. As a result, a visit with the parents was cancelled. On July 30, D.B. ran away again, and the police returned him to the group home. The July 29 drug test turned out to be negative.

The parents did not personally appear at the August 1, 2011, interim hearing. D.B. said he had not seen them for six or seven weeks. After a discussion of the July events, Donald's counsel suggested a visit at the group home as an alternative to cancelling a visit. The court ordered that a visit take place within a week. The court set an interim review hearing for September 15 for an update on D.B.'s success in staying sober, doing well in school and not running away. The court said it hoped to read a report on September 15 saying that D.B. had "had more visits, more outings; [was] not on restriction; [was] doing well in school."

In August 2011, D.B. ran away from his placement three times. The third time he was gone for two days, and police officers returned him to the group home after he was

caught shoplifting. By early September, D.B. had brought drugs to the group home on at least three occasions; each time he was restricted to the grounds of his placement.

On September 6, 2011, the Agency filed its report for the September15 interim hearing. The report recommended that the parents' unsupervised visits continue to be on "grounds . . . at this time due to [D.B.]'s unstable behavior and the parents[']' inability to safely maintain [D.B.] in their home during unsupervised passes." In her report, D.B.'s CASA stated that the parents chose not to visit D.B. at the group home because they had young children; the parents wanted visits to take place at their home; they relied on group home staff members to transport D.B.; and the staff had not been transporting D.B.

The parents did not attend the September 15, 2011, interim hearing. After a discussion of visitation, R.H.'s counsel contended that visits should take place in the parents' home, where D.B. could see his siblings. R.H.'s counsel argued that if the Agency sought to restrict visits to the grounds of the group home, it was required to file a section 388 modification petition. Donald's counsel joined in the argument and asserted there should be "a chance to be heard." The Agency's counsel then requested unsupervised visits on the grounds of D.B.'s placement and, as an interim order, supervised visits elsewhere. The court declined to order supervised visits without a section 388 petition. It ordered that unsupervised visits continue, so long as they took place on the grounds of the group home.

The parents' attorneys then asserted that this order effectively precluded visits, because transportation problems prevented the parents from going to the group home. The Agency's counsel explained that the parents lived in Escondido, D.B. was placed in

Chula Vista, the parents had "a vehicle" and the social worker and the group home had offered to transport the parents to the facility every Sunday. The Agency offered no evidence to support this explanation.

The court confirmed its order for unsupervised visits on the grounds of the group home. Donald's counsel asked for an evidentiary hearing on the issue. The court denied the request, and said it would reconsider the issue as soon as D.B. stopped running away. It confirmed a post-permanency planning review hearing set for December 1, 2011.

The Agency requests judicial notice of the minute order of the December 1, 2011, hearing, and augmentation of the record on appeal with a report it prepared for that hearing. We deny the requests.

DISCUSSION

After the court orders another planned permanent living arrangement as the permanent plan, "the status of the child shall be reviewed at least every six months." (§ 366.3, subd. (a); Cal. Rules of Court, rule 5.740(b).) "[V]isitation is a proper issue to address at the [review] hearing[s]." (*In re Kelly D.* (2000) 82 Cal.App.4th 433, 438.) As a matter of due process (*In re J.F.* (2011) 196 Cal.App.4th 321, 327), "the . . . parents . . . are entitled to receive notice of, and participate in, those hearings." (§ 366.3, subd. (f).) Thus, if the Agency proposes a change to a visitation order, the parents can challenge the proposal at the review hearing. (*In re J.F., supra,* at p. 331.) The right to bring such a challenge encompasses "the right to testify and otherwise submit evidence, cross-examine adverse witnesses, and argue [the] case." (*In re Kelly D., supra,* at p. 440.)

The Agency contends the parents have forfeited the right to assert a denial of due process because they did not raise the issue in the juvenile court. The parents did, however, contend that the Agency was required to file a section 388 petition before visits could be restricted; R.H.'s counsel asked for "a chance to be heard"; and Donald's counsel asked for an evidentiary hearing. Thus, the parents asserted their right to "a meaningful opportunity to be heard," an essential element of due process. (*In re J.F.*, *supra*, 196 Cal.App.4th at p. 335.) There was no forfeiture.

The parents contend modification of the visitation order could be effected only in a section 388 proceeding. They cite no authority supporting this contention, and we have discovered none.

The parents contend they were not given notice of the Agency's proposed visitation restriction. The Agency's report, filed 11 days before the September 2011 hearing, announced the proposed restriction. Moreover, at the August hearing, which the parents did not attend despite having been ordered to do so, the court stated that visitation would be addressed at the September hearing. Additionally, at the August hearing Donald's counsel suggested an onsite visit as an alternative to cancelling a visit.

We need not discuss the notice issue further, as there was a clear denial of the parents' due process right to an evidentiary hearing on the proposed visitation restriction. The request of R.H.'s counsel for "a chance to be heard", although made in the context of an argument regarding section 388, was tantamount to a request for an evidentiary hearing. Donald's counsel expressly asked for an evidentiary hearing, and the court denied the request. "[P]ursuant to the express language of subdivision [f] of section

366.3, [the parents are] entitled to that hearing." (*In re Kelly D., supra*, 82 Cal.App.4th at pp. 439-440.) The fact that this was an interim review hearing should not dictate a different result. (§ 366.3, subd. (k).)

The error in denying an evidentiary hearing was not harmless. (*In re J.F., supra*, 196 Cal.App.4th at p. 336, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result] and *Chapman v. California* (1967) 386 U.S. 18, 28 [error not harmless beyond a reasonable doubt].) The court based its order restricting visits to the grounds of the group home solely on its "concern[] about [D.B.] AWOLing from . . . his visits." Yet D.B. had run away from the grounds of the group home three times, and, as the court noted, "some of [his] behavior might be caused by the isolation." D.B.'s therapist had suggested that the CASA take D.B. to visit the parents. The day before the September 2011 hearing, the social worker had taken D.B. to see D.B.'s great-grandmother, who was in a nursing home. D.B. had not run away while on outings with his CASA or during visits with relatives. Finally, the parents must be allowed to present evidence to support their need or preference for in-home visits.

In light of our conclusion, we need not consider whether the visitation restriction was an abuse of discretion.

DISPOSITION

The order restricting the parents' visits to the grounds of D.B.'s placement is reversed. The case is remanded to the juvenile court with directions to hold a contested hearing on the proposed restriction of the parents' visits to the grounds of D.B.'s placement.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.